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In the Supreme Court of the United States

October Term, 1947

No. 590

Harris Kennedy, et al., petitioners

v.

Silas Mason Company

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinions of the district court (R. 220–235; 238–239) are reported at 68 F. Supp. 576 and 70 F. Supp. 929. The majority, concurring, and dissenting opinions of the Circuit Court of Appeals (R. 249–256) are reported at 164 F. 2d 1016.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 12, 1947 (R. 256). The petition for certiorari was filed February 13, 1948, and was granted on March 8, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether persons employed pursuant to a cost-plus-fixed-fee contract between a private company and the United States to produce munitions for use in the prosecution of war are employees of the Government or of the private contractor?

2. Whether the munitions produced under such circumstances and shipped across State lines for use in the war are produced for "commerce" within the meaning of the Fair Labor Standards Act?

3. Whether the munitions produced under such circumstances are "goods" within the meaning of Section 3 (i) of the Act?

STATUTES INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, are as follows:

> SEC. 3. As used in this Act—
>
> * * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.
>
> * * * * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, * * *.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

The pertinent provisions of the Act of July 2, 1940, c. 508, 54 Stat. 712, are as follows:

SEC. 1 (a). * * * the Secretary of War is authorized * * * (2) to provide for the * * * manufacture * * * of military equipment, munitions, and supplies * * * *Provided* * * * That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (49 Stat. 2036; U. S. C., Supp. V, title 41, secs. 35–45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: * * *

SEC. 1 (b). The Secretary of War is further authorized, with or without advertising, to provide for the operation and main-

tenance of any plants, buildings, facilities, utilities, and appurtenances thereto constructed pursuant to the authorizations contained in this section and section 5, either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them, * * *.

SEC. 4 (b). Notwithstanding the provisions of any other law, the regular working hours of laborers and mechanics employed by the War Department, who are engaged in the manufacture or production of military equipment, munitions, or supplies shall be eight hours per day or forty hours per week during the period of any national emergency declared by the President to exist: *Provided,* That under such regulations as the Secretary of War may prescribe, such hours may be exceeded, but compensation for employment in excess of forty hours in any workweek, computed at a rate not less than one and one-half times the regular rate, shall be paid to such laborers and mechanics.

STATEMENT

This action was brought pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 to recover unpaid overtime compensation and liquidated damages allegedly due petitioners for violations of the Act (R. 1-8).[1] Respondent,

[1] The complaint also alleged a cause of action under the Walsh-Healey Public Contracts Act (Act of June 30, 1936, 49 Stat. 2036, 41 U. S. C. 35), but as no question as to the applicability of that Act was raised in the petition for cer-

relying upon the affidavit of its Vice-President (R. 20-22) and its contract with the War Department pursuant to which petitioners were employed (R. 22-218), moved for summary judgment (R. 19-20), which was granted by the district court (R. 240). The Circuit Court of Appeals, sitting *en banc*, affirmed the judgment, Judge Sibley concurring in a separate opinion and Judge Hutcheson dissenting (R. 249-256).

Respondent entered into a contract with the War Department to construct and operate a plant for the loading of shells, ammunition, bombs, and other products and materials at Minden, Louisiana, pursuant to a cost-plus-a-fixed-fee contract between respondent and the United States (R. 2-3, 20-21). Under the contract respondent was required to prepare the completed munitions for shipment out of the State for use in the conduct of war, and to load them on carriers in accordance with the Government's shipping instructions (R. 45-46). The plant and equipment used in the production activities, as well as the goods worked on, were the property of the United States (R. 21).

tiorari, no issue as to its applicability is before the Court. *Helis* v. *Ward*, 308 U. S. 365, 370. While the coverage of the Fair Labor Standards Act and the Walsh-Healey Act may overlap, there is nothing inconsistent in the application of both statutes, where both are applicable by their terms. See Fair Labor Standards Act, Section 18, 29 U. S. C. 218. Cf. *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945, 948 (C. C. A. 6).

The contract, pursuant to which respondent constructed and operated the plant, referred to respondent as the "contractor" and provided that the contractor was "the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract" (R. 48). The contract also stated that the employees "shall be subject to the control and constitute employees of the Contractor" (R. 45, 113). The contractor employed the workers, and of course hired, fired and paid them (R. 45, 226). The contract permitted the Contracting Officer to require the dismissal of any employee deemed incompetent "or whose retention is deemed to be not in the public interest" (R. 76). The contractor was to receive specified fees under the contract, in addition to reimbursement for costs (R. 21), but the contract provided for renegotiation of these fees "to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits" (R. 128). If the contractor failed promptly to pay bills and payrolls incurred under the contract, the Government was authorized to pay such bills or payrolls as were not disputed in good faith by the contractor, and to deduct five percent of the amount so paid from the contractor's fee (R. 63.). Costs which were not reimbursable under the contract included salaries of the contractor's executive officers, expenses incurred in conducting the contractor's main office

or regularly established branch offices, any interest on capital employed or money borrowed (R. 60, 119), and wages in excess of those approved by the Government (R. 36–37). The contract also provided that "in case the full time of any employee of the Contractor at the Plant is not applied to the work," his salary shall be considered a reimbursable cost "in proportion to the actual time applied thereto" (R. 53, 55–56).

The contract contemplated compliance by the contractor with various Federal and State regulatory statutes applicable to private employers. Specific provision was made for compliance in appropriate situations with the Eight-Hour Law (R. 38–39, 41, 43), the Walsh-Healey Act (R. 47–50, 116), and other statutes regulating the wages to be paid by employers engaged in work under contracts with the Government (R. 35–38). Compliance with the Social Security Act was also contemplated by the inclusion of the employer's contribution as a reimbursable cost under the contract (R. 54). The contractor was required to provide for all its employees "Workmen's Compensation Insurance or such other protection for employees as may be required by Federal or State statutes in the jurisdiction in which such work is performed * * *" (R. 78). It also agreed to "Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations and ordinances and

other rules of the United States of America, of the state, territory, or subdivision thereof wherein the work is done, or of any other duly constituted public authority" (R. 75).

The contractor was required to operate the plant "as directed from time to time by the Contracting Officer" (R. 44). When the Contracting Officer deemed the Contractor's personnel or overhead to be excessive, he could order reductions, and if he was of the opinion that the Contractor had fallen beyond the progress schedule he could order an increase in the number of working days per week or hours of labor per day (R. 34).

The court below, affirming the judgment of the district court, held that petitioners were not within the scope of the Act on the grounds (1) that they "were working directly under the supervision and control of the Government" and were therefore precluded from recovery as employees of the United States, and (2) that the munitions "never at any time went into or became a part of commerce as defined by the Fair Labor Standards Act" (R. 250, 251). As an alternative ground of decision, the court held (3) that if respondent was not an agency or instrumentality of the United States, and if the munitions were produced "for commerce," and if the United States was not the producer or the employer, then the Act was inapplicable because the munitions

were not "goods" under Section 3 (i) of the Act (R. 252-253).[3]

SUMMARY OF ARGUMENT

I

The employees of the contractor were not exempt from the Fair Labor Standards Act as employees of the United States. It is well established that persons who work for those who contract with the Government are not the Government's employees, even though the economic burden falls on the Government through a cost-plus arrangement, and even though the Government may have a supervisory control over the performance of the contract. Here the contract expressly provided that the employees "shall be subject to the control and constitute employees of the Contractor." This provision accurately described the manner in which the contract was performed. The contract also subjected the contractor to many statutes inapplicable to Government employees. The effect of the decision below

[3] Judge Sibley concurred, stating that he "would prefer to pass over the question" whether petitioners were the employees of respondent or of the Government, and hold only that the munitions were produced for war and not for commerce (R. 253-254). Judge Hutcheson dissented, stating that "here the whole elaborate system was designed and operated so that the United States should not be the employer," and that the munitions, since they were "produced for transportation from a state to a place outside thereof," were goods produced for commerce within the coverage of the Act (R. 255).

is to hold employees of such contractors to be Government employees for purposes of the Fair Labor Standards Act but not with reference to anything else.

Section 4 (b) of the Act of July 2, 1940, which the court below held to supersede the Fair Labor Standards Act, applies only to persons "employed by the War Department," not to persons who are not Government employees. If petitioners are not the employees of the Government, the statute has no application.

II

Munitions intended to be carried across state lines by the Government for war purposes are produced for interstate commerce. The Fair Labor Standards Act defines interstate commerce in constitutional terms, and it is established by many decisions of this Court that such commerce is not limited to interstate transactions for commercial purposes in the strict sense. Nothing in the language or purpose of the Act supports a restrictive interpretation. The Department of Justice, the Wage and Hour Administrator, the National Labor Relations Board, the Comptroller General, and even the War Department in 1942, have all been of the view that the shipment of Government owned munitions across state lines constitutes interstate commerce under the national labor legislation. Furthermore, in enacting the Portal-to-Portal Act, Congress predicated

its findings on the assumption that the employees of cost-plus contractors were subject to the Fair Labor Standards Act.

III

Section 3 (i) of the Fair Labor Standards Act, which excepts from the definition of goods "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor", does not apply to respondents' manufacturing operations which occurred before the goods were delivered into the possession of the United States as ultimate consumer. Inasmuch as the exemption excludes the productive operations of the ultimate consumer, the result of the construction adopted by the court below is to subject to the Act the manufacturing operations of an ultimate consumer but to exempt the same operations if carried on by an independent manufacturer who sells to the ultimate consumer within the state but for interstate shipment. The decision below also means that if an ultimate consumer takes delivery within the state the producers' operations are exempt, but if he takes delivery after interstate transportation the producers' operations are covered. The language, purpose, and history of Section 3 (i) show that it was not intended to have any such capricious results, which would seriously impair the general coverage of the Act, but was designed to protect the

consumer from liability for transporting goods produced under substandard conditions. The consistent administrative interpretation, supported by the Department of Justice, has limited the exemption to the consumers, as Congress intended, and not extended it to producers of goods for commerce. The circuit courts of appeals (except for the Fifth Circuit in some of its decisions) have come to the same conclusion.

ARGUMENT

INTRODUCTION

The respondent is a Government cost-plus contractor who has been represented in this case by private counsel. The Administrator of the Wage and Hour Division of the Department of Labor appeared as *amicus curiae* in the court below in opposition to respondent's contentions on the questions of coverage. The court below accepted respondent's contentions. We are of the opinion that that decision is unsound.

The Department of the Army is of the view that respondent's position has merit for the reasons set forth in the brief filed by respondent. The Army is concerned with the great cost to which the Government will be subjected if the numerous suits akin to this are lost, or even if it must bear the cost of defending them. Furthermore, the Army believes that the classes of employees involved in these cases were well paid, that they accepted their compensation without complaint or expectation of

receiving more until this litigation was commenced sometime after the termination of their employment, and that accordingly there is little equity in the employees' present position. Although we are aware of the difficulty in defending these suits, as a result of the dispersal of the documents and personnel necessary to the defense, and of the heavy costs involved, we cannot regard these factors as controlling in the interpretation of an important regulatory statute which it is the duty of the Government to enforce. The Department of Justice and the Wage and Hour Administrator have consistently regarded these cost-plus contractors as subject to the Fair Labor Standards Act. See n. 11, pp. 26–27, *infra*. And it is to be noted that in 1942 the Secretary of War was apparently of the same opinion.[8]

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[8] On August 25, 1942 the Secretary of War wrote to the Comptroller General in part as follows (22 Comp. Gen. Dec. 277, 278):

"It seems to be generally conceded by the Ordnance Department, in its Manual of Instructions for the Administration of Contracts, Section XI–G–1, 2, and 3, and Section XI–I–4, that the Act is applicable. (However, the expression was in September, 1941, and after the fact upon which part of the claim arose in the instant case.) This same view is expressed by the Office of the Under Secretary of War as may be seen from the following excerpt from a memorandum dated September 30, 1941, Director of Purchases & Contracts, to The Quartermaster General:

"'* * * Furthermore, it is the expressed policy of the War Department, that all its contractors should comply with the statement of labor policy adopted by the Ad-

This brief is concerned only with the question whether the Fair Labor Standards Act may apply to the employees of Government cost-plus contractors producing munitions for delivery to the Government for use in war. We take no position as to whether the particular petitioners in this case have any valid claim in other respects.

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visory Commission on August 21, 1940. This statement of policy provides in part as follows:

"'All work carried on as part of the defense program should comply with federal statutory provisions affecting labor wherever such provisions are applicable. This applies to the Walsh-Healey Act, Fair Labor Standards Act, the National Labor Relations Act, etc.'

"'It is the opinion of this office that this policy was intended to apply to employees of cost-plus-a-fixed-fee contractors whenever applicable to employees of similar lump sum contractors.'

"The General Accounting Office, through the Assistant Chief, Audit Division, expressed a view as to the applicability of the Fair Labor Standards Act in a letter, dated June 30, 1942, sent through the Chief of Ordnance to the Commanding Officer, Wolf Creek Ordnance Plant. The letter stated that the Fair Labor Standards Act was applicable to custodial and administrative employees of Procter & Gamble, operators of the Ordnance Plant at Milan, Tennessee under a cost-plus-a-fixed-fee contract, W-ORD-494. While not so stated in the letter, the logical implication appears to be that other contractors operating under similar contracts are also covered by the Act.

"The Ordnance Department is aware, of course, of the fact that the United States is not an *employer* as that term is defined in Section 3 (d) of the Fair Labor Standards Act, and is, therefore, specifically excluded from its requirements. See also 20 Comp. Gen. 24. This exclusion would not, however, cover Ordnance cost-plus-a-fixed-fee contractors as operating employers since such Ordnance Contractors have been designated in Title VIII, Article

In the event that the decision below is reversed, this will not establish the liability of the Government or the contractor, since the various other defenses such as particular exemptions, defenses under the Portal-to-Portal Act, failure of proof, statute of limitations, etc., are still available. A remand for trial on these issues will be necessary if the decision below is reversed on the question of coverage.

I

Petitioners Were Employees of Respondent, not of the United States

The holding of the court below that respondent was an agent or instrumentality of the United States, and hence excluded from the scope of the Act under Section 3 (d),[4] is contrary to the controlling decisions of this Court under other statutes as well as to the decisions of the other circuit courts of appeals which have passed on

VIII–A–6 of the instant contract, and generally in other Ordnance contracts, to be independent contractors. The Supreme Court, in the case of *Alabama* v. *King and Boozer, et al*, decided November 10, 1941, 314 U. S. —, and the Comptroller General in his decisions B–19726, B–19052, 21 Comp. Gen. 682, and B–23012, dated February 9, 1942, expressed the same opinion. As independent contractors, they would be employers, as that term is defined in the Fair Labor Standards Act, and, if engaged in interstate commerce, as they appear to be, then their employees are entitled to the overtime provided for in the Act."

[4] Section 3 (d) provides that the term "employer" "shall not include the United States."

this issue under the Fair Labor Standards Act. The ruling is also contrary to the express terms of the contract between respondent and the United States and to the previously expressed view of the Secretary of War.[5]

It is settled under this Court's decisions that service performed by a private corporation "under a contract with the United States does not make it an instrumentality of the latter," even though the service is performed on Government-owned property and under "supervisory" control by the Government. See *Buckstaff Co.* v. *McKinley,* 308 U. S. 358, 360, 362–363 (holding the exemption in the Social Security Act for services performed "in the employ of the United States Government or of an instrumentality of the United States" inapplicable to employees of an Arkansas corporation organized for profit whose only business was the operation of a bath house on the United States Government Reservation known as Hot Springs National Park). "That control, being wholly supervisory, is not to be differentiated from the type of control which the United States may reserve over any independent contractor without transforming him into its instrumentality." *Id.,* at 363. More recently, in *United States* v. *Silk,* 331 U. S. 704, 712, the Court stated that "Obviously the private contractor who undertakes to build at a fixed

[5] See note 3, *supra.*

price or on cost-plus a new plant on specifications is not an employee of the industry thus served nor are his employees." See also *Alabama* v. *King & Boozer*, 314 U. S. 1; *Curry* v. *United States*, 314 U. S. 14; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149; and *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514. Applying these decisions to cases under the Fair Labor Standards Act, the circuit courts of appeals have hitherto consistently ruled that Section 3 (d) of the Act did not exclude employees of contractors with the Government. *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945, 949 (C. C. A. 6); *Walling* v. *McCrady Construction Co.*, 156 F. 2d 932, 934 (C. C. A. 3); *Kelly* v. *Ford, Bacon & Davis*, 162 F. 2d 555, 557, n. 4 (C. C. A. 3); see also *Bell* v. *Porter*, 159 F. 2d 117 (C. C. A. 7), certiorari denied, 330 U. S. 813; *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 (C. C. A. 9); *Diwins* v. *Hazeltine Electronics Corp.*, 163 F. 2d 100 (C. C. A. 2). Cf. *National Labor Relations Board* v. *Carroll*, 120 F. 2d 457 (C. C. A. 1).

The contract in this case explicitly provides that the employees "shall be subject to the control and constitute employees of the Contractor" (R. 45, 113). Although such a contractual provision in and of itself is not necessarily controlling (*Rutherford Food Corp.* v. *McComb*, 331 U. S. 722; *Bartels* v. *Birmingham*, 332 U. S. 126), here the record evidence descriptive of the relationship between the parties consists almost exclu-

sively of the contract and its supplements, which are nowhere controverted (R. 22-218).[6] Under the contract (R. 45) and in fact (R. 226) the contractor hired, fired and paid the employees, and they were subject to the contractor's control.[7] The contract recognized that employees of the contractor might be engaged both in work under the Government contract and in other work for the contractor not related to the Government contract (R. 53, 55-56). If the contractor failed to meet his payroll promptly the Government was authorized under the contract to meet the payroll and to deduct a penalty from the contractor's fee (R. 63). In addition, the contract provided for the applicability of the Walsh-Healey Act (R. 47), the Eight Hour Law of June 19, 1912 (40 U. S. C. 324) (R. 38), State workmen's compensation insurance laws (R. 78), and the Social Security Act (R. 54), none of which are applica-

[6] The only other evidence consists of an affidavit by respondent's manager (R. 20-22) and affidavits of three employees, quoted in the opinion of the District Court (R. 225-227). These affidavits do not suggest that the work was not performed in the manner prescribed in the contract or that the contract's provision as to the employment relationship was not in accord with "reality." Cf. *Bartels* v. *Birmingham*, 332 U. S. at 131.

[7] The Contracting Officer's right to require the Contractor to dismiss employees deemed incompetent or whose retention was not deemed in the public interest (R. 76) does not make the Government the employer, as *National Labor Relations Board* v. *Atkins & Co.*, 331 U. S. 398, 407, which involved much stronger provisions for governmental control, attests.

ble to Government employees. Furthermore, the contract prescribed fines and penalties payable to the Government for violations of the Eight Hour Law (R. 39) and Walsh-Healey Act (R. 49), provisions inconsistent with the theory that respondent was the Government's agent and not a private contractor. *United States* v. *Driscoll,* 96 U. S. 421, 423-424. Other stipulations in the contract inconsistent with such a theory are the provisions (R. 128, 129) that excessive profits to respondent may be scaled down (the Government pays no profits to its agencies), the provision that wage costs higher than those authorized by the Government would be borne by the respondent (R. 36-37), and the representation by respondent that it was "a manufacturer" or "a regular dealer" (R. 48).

All of these provisions indicate that the explicit pronouncement in the contract that the persons employed shall "constitute employees of the Contractor" (R. 45) was an accurate description of the employment relationship. Inasmuch as these provisions of the contract have been given effect, the result of the decision below is to hold the persons hired by respondent to be employees of the Government rather than of the contractors only for purposes of the Fair Labor Standards Act, and not with reference to anything else.

Although *Alabama* v. *King and Boozer,* 314 U. S. 1, dealt with a different problem, it involved a contract quite similar to that before the Court

in this case. See Transcript of Record, 1941 Term, No. 602, pp. 47–68. The contractor here would seem to be the purchaser of the labor supply just as the contractor there was the purchaser of the raw material, despite the close governmental supervision over the operations of the contractor in each instance. See 314 U. S. at 13. In each case there was a cost-plus arrangement which imposed the ultimate "economic burden" (*id.* at 12) upon the Government. But it would not seem in this case any more than in that one that these factors "gave to the contractors the status of agents of the Government". *Id.* at 13.

It may be suggested that *United States* v. *United Mine Workers*, 330 U. S. 258, indicates that the petitioners here were government employees. The issue in that case was entirely different, however, since it involved government operation of the mines in substitution for the private employers and in accordance with the terms of a labor agreement between the Government itself and the union. See 330 U. S. at 284–288.

The Act of July 2, 1940. In holding that petitioners were employees of the United States, the court below attached some weight to the fact that the contract was authorized under the Act of July 2, 1940, 54 Stat. 712 (R. 24), Section 4 (b) of which provides:

> Notwithstanding the provisions of any other law, the regular working hours of laborers and mechanics *employed by the War Department,* who are engaged in the manufacture or production of military equipment, munitions, or supplies shall be eight hours per day or forty hours per week during the period of any national emergency declared by the President to exist: *Provided,* That under such regulations as the Secretary of War may prescribe, such hours may be exceeded, but compensation for employment in excess of forty hours in any workweek, computed at a rate not less than one and one-half times the regular rate, shall be paid to such laborers and mechanics. [Italics supplied.]

This provision on its face applies only to persons "employed by the War Department". If, as has been argued, petitioners are not employees of the War Department but of the respondent, the Act can have no application.

The court below apparently assumed that all persons employed under contracts authorized by the Act were "employed by the War Department" within the meaning of Section 4 (b). The Act in question, however, specifically authorized the operation of munitions plants "*either* by means of Government personnel *or* through the agency of selected qualified commercial manufacturers un-

der contracts entered into with them * * *."
Section 1 (b), *supra*, pp. 3-4. [Italics supplied.]
Section 4 (b) of the Act refers to overtime for employees "employed by the War Department," i. e., "Government personnel." Sections 1 (a) and 5 of the Act provide that contracts entered into pursuant to its provisions may be subject to the Walsh-Healey Public Contracts Act, providing for minimum wages and overtime for employees of contractors with the Government (i. e., "selected qualified commercial manufacturers"). These provisions are plainly concerned with the employees of private contractors. Section 4 (b) provided overtime for Government employees to whom the Walsh-Healey provisions could not apply. The reference to "notwithstanding the provisions of any other law" in Section 4 (b), emphasized by the court below, seems clearly to relate to the laws which at that time prohibited overtime for Government employees,[8] and not to the Walsh-Healey or Fair Labor Standards Act which at no time applied to employees of the War Department. Thus the Act of July 2, 1940 supports petitioners here, and not the view of the court below.

[8] Section 5 of the Act of March 3, 1893, 27 Stat. 715, as amended, 30 Stat. 316, 5 U. S. C. 29; see also Act of March 3, 1931, 46 Stat. 1482, 5 U. S. C. 26a, relating to Saturday work. Subsequent to the Act here in question, Congress provided for overtime compensation for Government employees, J. Res. of December 22, 1942, c. 798, 56 Stat. 1068.

II

THE MUNITIONS WERE PRODUCED FOR "COMMERCE" WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT

"Commerce" is defined in the Fair Labor Standards Act to mean "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." Section 3 (b). This definition on its face is as broad as the constitutional phrase. Since the munitions in this case were produced for "transportation" from the State of Louisiana to a "place outside thereof," they were produced for "commerce" within the literal terms of the statutory definition. In reaching a contrary conclusion the court below reasoned that the munitions "were not manufactured for sale, nor were they ever intended or used for commercial purposes" (R. 250). But this Court, in numerous decisions has established that the movement of goods or persons across State lines is "commerce" even though no commercial transaction or purpose is involved. *United States* v. *Simpson*, 252 U. S. 465; *United States* v. *Hill*, 248 U. S. 420, 423–424; *Edwards* v. *California*, 314 U. S. 160, 172; *Thornton* v. *United States*, 271 U. S. 414, 425; *Caminetti* v. *United States*, 242 U. S. 470; *Gooch* v. *United States*, 297 U. S. 124; *Brooks* v. *United States*, 267 U. S. 432. See

also *United States* v. *Darby,* 312 U. S. 100, 113, where the Fair Labor Standards Act was upheld as a regulation of commerce on the authority of several of the above "non-commercial" cases.

It has thus long been settled that "commerce" as used in the Constitution includes "the transportation of persons and property no less than the purchase, sale and exchange of commodities," (*United States* v. *Hill,* 248 U. S. 420 at 423), and that "It is immaterial whether or not the transportation is commercial in character" (*Edwards* v. *California, supra,* at 172). There can be no question, therefore that interstate commerce includes the interstate transportation of Government owned goods irrespective of whether such transportation be commercial in the strict business sense.

The issue here is whether Congress intended to exclude the transportation of Government owned goods, which literally come within the statutory definition, from the "commerce" regulated by the Fair Labor Standards Act—a question which, in view of the exemption for the Government as an employer, arises only with respect to the employees of private employers producing material for the Government. Clearly no such limitation appears in the broad statutory definition, which includes the language of the Constitution. Nor is there anything in the legislative history of the

Act which indicates a Congressional intent to narrow the definition so as to except the transportation of Government-owned goods. On the contrary this Court has recognized that it was clearly the purpose of the Act to extend its control "throughout the farthest reaches of the channels of interstate commerce". *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 567.[9] "Nowhere in the Act is it suggested that Congress intended that transportation effected by the Government or of Government goods be treated differently from all other transportation." *Bell* v. *Porter,* 159 F. 2d 117, 119 (C. C. A. 7), certiorari denied, 330 U. S. 813.[10]

There would thus appear to be no valid reason or authority for confining the scope of this Act to transportation for "commercial" purposes. Accordingly, throughout the course of the war, all of the Government agencies concerned proceeded on the assumption that production of munitions and other goods to be shipped across State lines for use by the Government in the prosecu-

[9] Citing the following statement by Senator Borah: "* * * if the business is such as to occupy the channels of interstate commerce, any of the employees who are a necessary part of carrying on that business are within the terms of this bill, and, in my opinion, are under the Constitution of the United States." 83 Cong. Rec., 75th Cong., 3d Sess., Part 8, p. 9170.

[10] See also *Clyde* v. *Broderick,* 144 F. 2d 348, 351 (C. C. A. 10).

tion of the war, was for "commerce" within the scope of the Federal statutes regulating labor standards and relations.[11] The Administrator of

[11] During the war much of the equipment, munitions and other materials needed for the prosecution of the war was produced under contracts like the one between the Government and respondent herein. The vast majority of the employees of such contractors were paid in accordance with the statutory standards. This was done pursuant to instructions from the Government contracting agency, in accordance with the mutual understanding of the various Government departments concerned that the Fair Labor Standards Act was applicable to employees of such cost-plus contractors. See opinion of the Comptroller General dated September 28, 1942, 22 Comp. Gen. Decisions 277 (n. 3, pp. 13–15, *supra*), quoting a letter from the War Department indicating its belief at that time that the Fair Labor Standards Act was applicable. The employees involved in this and similar suits are in the main employees who were thought to be within some exempting provision of the Act or as to whom there has been some dispute regarding hours of work. For example, petitioners here were foremen or safety inspectors who were believed to be employed in an "executive" capacity within the exemption provided by Section 13 (a) (1), a defense still to be litigated in the event the decision below is reversed. Employees involved in other cases have been firemen as to whom there has been a dispute as to what hours are to be counted as hours worked (e. g. *Bell* v. *Porter*, 159 F. 2d 117 (C. C. A. 7), certiorari denied, 330 U. S. 813). Except for employees as to whom there was some such particular defense, the employees of cost-plus contractors were considered subject to the Act and were compensated accordingly throughout the years of the operation of these contracts.

In establishing the policy for defending suits by individual employees, the Department of Justice instructed the U. S. Attorneys not to assert, in the cases in which they represented the contractors, the defenses that cost-plus contractors were not engaged in commerce or in the production of goods for commerce or that their employees were exempt as Government employees, since it was the Department's opinion

the Fair Labor Standards Act [12] and the National Labor Relations Board [13] have both consistently so ruled, and the great weight of judicial authority has supported this position.[14]

It is not clear from the opinion of the court below what reasoning or authority was thought to support its restrictive interpretation of "commerce." While the opinion states that the court adheres to its previous ruling (in *Atlantic Co.* v.

that such defenses lacked substantial merit and were not in the interests of the United States. For a time the Department also instructed the U. S. Attorneys to advise private counsel for the contractors that it was the opinion of the Department that such defenses lacked substantial merit. The Secretaries of War and the Navy were advised of the Attorney General's views. Nevertheless private counsel for the contractors have raised such defenses in the instant and in other cases.

[12] Quoted in 22 Comp. Gen. Dec. 277, 281.

[13] *In the Matter of Reynolds Corp.*, 74 N. L. R. B. No. 248; see also decisions cited in the Memorandum for the United States on Petition for Writ of Certiorari, p. 3, fn. 1.

[14] See *Bell* v. *Porter*, 159 F. 2d 117 (C. C. A. 7), certiorari denied, 330 U. S. 813; *Umthun* v. *Day and Zimmerman*, 235 Iowa 293, and the list of trial court decisions in the Memorandum for the United States in support of the petition for certiorari, pp. 4-5. See also *Newport News Shipbuilding & Dry Dock Co.* v. *National Labor Relations Board*, 101 F. 2d 841, 843 (C. C. A. 4), where the court rejected the argument that the construction of men-of-war for the U. S. Navy could not be considered interstate commerce within the meaning of the National Labor Relations Act because such ships were "not designed to serve as carriers of commodities for sale or barter," pointing out that such vessels nevertheless were "intended to navigate the public waters of the United States and to transport persons and property from state to state and to foreign countries" [citing the *Caminetti* and other decisions].

Walling, 131 F. 2d 518) that "the Congress in defining 'commerce' intended to give to the term the broadest possible meaning," it held that this would not include "the transportation during war of Government owned munitions." Its reliance upon the Second Circuit's decision in *Divins* v. *Hazeltine Electronics Corp., supra*, suggests that it was the war use of the goods which led the courts to conclude there was no commerce. However, the court itself specifically states that if it were convinced that defendant, as an independent contractor, had been "engaged under its contract in the business of manufacturing munitions of war" for sale to the Government, it would be of the opinion that defendant was within the Fair Labor Standards Act. If the court's decision rests on the fact that the Government owned the materials during production and transportation,[15] this is inconsist-

[15] "It is generally recognized that, as far as commerce is concerned, the one who owns the goods when transportation is effected is immaterial." *Jackson* v. *Northwest Airlines*, 75 F. Supp. 32, 39 (D. Minn.); *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453, 463.

The statement in the opinion in the instant case that transportation was "by the Government" (R. 251) is not supported by the record. Under the contract respondent was charged with "the preparation of the product for shipment and the loading of same on cars or other carriers in accordance with the Government's shipping instructions" (R. 45–46, 81). A later amendment to the contract indicates more specifically that the transportation was to be effected by the contractor rather than by the Government: "The Contractor shall, as directed by the Contracting Officer's Representative, transport or cause to be transported,

ent with its statement that its decision did not conflict with *Bell* v. *Porter, supra,* and is also contrary to its decision in *St. Johns River Shipbuilding Co.* v. *Adams*, 164 F. 2d 1012, decided

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by subcontract or otherwise, any of the products of said Plant to such points within the continental United States as may be designated" (R. 114). There is no indication in the opinion of the court below whether it attached any particular significance to this factor. See *National Labor Relations Board* v. *Idaho-Maryland Mines Corp.*, 98 F. 2d 129 (C. C. A. 9), holding the mining and sale of gold to the Government, where the gold was delivered to the mint in the state of production, there commingled with the product of other producers, and then transported by the Government to a mint in another State, was not "commerce" within the National Labor Relations Act because the interstate shipments were made "not as commercial transactions, but as administrative acts of Government." The court emphasized the fact that the producer in that case did "not make these [interstate] shipments or cause them to be made". 98 F. 2d at 131. Cf. *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. 2d 780 (C. C. A. 9), certiorari denied, 312 U. S. 678; *Canyon Corp.* v. *National Labor Relations Board*, 128 F. 2d 953 (C. C. A. 8); *Walling* v. *Haile Gold Mines*, 136 F. 2d 102 (C. C. A. 4); *Fox* v. *Summit King Mines*, 143 F. 2d 926 (C. C. A. 9); *Timberlake* v. *Day & Zimmerman*, 49 F. Supp. 28, 32–33 (S. D. Iowa), refusing to apply the *Idaho-Maryland* decision where the producer or contractor made or was obliged to arrange for the interstate shipment. Apart from the doubts as to the legal soundness of the *Idaho-Maryland* doctrine (see *Timberlake* v. *Day & Zimmerman*, *supra*, at 32–33), the courts (including the Ninth Circuit which originated it, see *Sunshine Mining Co.* case, *supra*) have limited the doctrine strictly to the facts of that case. As noted above, the record here does not support the assumption that the interstate shipment was made by the Government.

the same day as the instant case. In the *St. Johns River* case, the same court held that the construction of "Liberty ships" for the United States under a cost-plus contract, at a Government-owned shipyard, using only Government-owned materials and tools, was covered by the Act, because the ships might serve "commercial" as well as war purposes.

Thus the court below evidently conceded that neither the Government ownership nor the war use, standing alone, would suffice to exclude the transportation of munitions from the scope of the statutory definition of "commerce". There would seem no greater reason for concluding that the two factors combined have that effect. The court below, like the Second Circuit in *Divins* v. *Hazeltine Electronics Corp.*, 163 F. 2d 100,[19] appears to have been particularly influenced by the view that something produced and transported solely for war (noncommercial) purposes could not be "commerce" in the constitutional or statutory sense. But, as pointed out *supra*, this view would appear to be precluded by the long line of decisions of this Court holding that any transportation of goods across State lines is "commerce"

[19] The *Divins* decision that the movement of battleships, etc., is not commerce does not go so far as to hold that the transportation of munitions for future military use is not commerce. On the contrary the Second Circuit held that armed cargo transports carrying munitions to the war zones would be engaged in commerce, a situation more analogous to that in the present case. 163 F. 2d at 102. For this reason we do not think the *Divins* case supports the decision below in this case.

whether or not "commercial" in character. We know of no authoritative precedents to the contrary.

The court below itself recognized in its opinion in the *St. Johns River* case (164 F. 2d at 1014) that the fact that interstate transportation is for war purposes does not preclude its also being "commerce." Certainly transportation by rail of Government-owned war material is interstate commerce for purposes of the Interstate Commerce Act. Cf. *United States* v. *Powell*, 330 U. S. 238; *Northern Pacific R. Co.* v. *United States*, 330 U. S. 248. It seems clear that the powers granted Congress under the Constitution, are not mutually exclusive. Thus the Government has in the past acted simultaneously under the "war" and "commerce" powers (see *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 326–330); as it also frequently proceeds simultaneously under its power over "commerce" and over the mails. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1, 11; *Electric Bond & Share Co.* v. *Securities & Exchange Comm.*, 303 U. S. 419, 432–433. The courts have consistently held that contractors carrying mail for the Government in the exercise of the postal power are within the scope of statutes regulating labor relations and standards under the commerce power. *National Labor Relations Board* v. *Carroll*, 120 F. 2d 457 (C. C. A. 1); *Fleming* v. *Gregory*, 36 F. Supp. 776

(E. D. La.). *Thompson* v. *Daugherty*, 40 F. Supp. 279 (D. Md.); *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742 (W. D. Va.). No reason has been advanced for reaching a different result with respect to contracts entered into under the war power. On the contrary, the statutory purpose to prevent the spread of undesirable working conditions through the use of the channels of interstate commerce would seem to require the maintenance of labor standards in the production of materials to be transported by the Government for war uses no less than to require such standards in the production of goods to be transported for non-war purposes.

The belief, which apparently weighed heavily with the court below (R. 253; see also opinion in *St. Johns River* case, 164 F. 2d at 1015), that the national interest would not be served by holding the Act applicable to employees in munitions factories, clearly did not warrant the result reached. This consideration would seem to be more properly addressed to the legislative than to the judicial branch of the Government. Congress, although fully advised of the fact that the Act was being applied to employees of contractors engaged on Government war contracts,[17] did not

[17] House Hearings before the Committee on Naval Affairs, 77th Cong., 2d Sess., on H. R. 6790; Senate Hearings before the Subcommittee of the Committee on Appropriations, 77th Cong., 2d Sess., on H. R. 6736, Part II (on "*Progress of the War Production Program*"); Annual Report of the Secretary of Labor for the Fiscal Year Ended June 30, 1942, pp.

see fit to enact any of the numerous proposed amendments designed to exempt such workers from the Act.[18]

The suggestion by the court below (R. 253) that the application of the overtime provisions of the Act to war production would "fasten shackles on the nation's feet as it marches to war" and "hinder the Government in * * * providing for the common defense" is contradicted by all official expressions of policy during the war, military as well as civil. The unanimous testimony of the officials of the War, Navy and Labor Departments and of the War Production Board was that war production might be harmed rather than helped by suspension of the overtime provisions of the Act. See Senate Hearings before the Subcommittee of the Committee on Appropriations on H. R. 6736, Part II (on "*Progress of the War Production Program*"), 77th Cong., 2d sess.; House Hearings before the Committee on Naval Affairs on H. R. 6790 ("a bill to permit performance of essential labor on naval contracts without regard to laws and contracts limiting

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2-3. See also Annual Report of the Administrator of the Wage and Hour Division to Congress for the years ending June 30, 1944, p. 11, and June 30, 1946, pp. 1-2.

[18] Some eighteen bills were introduced in Congress proposing the suspending or restricting of the overtime provisions of the Act for the war's duration. Senate Bills Nos. 2232, 2373, and 2884, and House Bills Nos. 6616, 6689, 6790, 6792, 6795, 6796, 6814, 6823, 6826, 6835, 7054, and 7731 of the 77th Congress, 2d Session; Senate Bills 190 and 237, and House Bill 992 of the 78th Congress, 1st Session.

hours of employment, etc."), 77th Cong., 2d sess. Under-Secretary of War Patterson stated that suspension of the overtime provisions would cause such a "violent change in the basis on which labor relations have been conducted" that it "might result in deterioration of labor relations * * * and * * * in decrease of production" (Senate Hearings, *supra,* p. 20; House Hearings, p. 2476). He unqualifiedly asserted that "There is no occasion for their suspension" (House Hearings, *supra,* at p. 2477).[19] See statements by Assistant Secretary of Navy Bard, Senate Hearings, *supra,* at p. 38, House Hearings, *supra,* at p. 2541; by War Production Board Chairman Nelson, Senate Hearings, *supra,* pp. 48, 56; by William S. Knudsen, Director of Production, War Department, Senate Hearings, *supra,* at p. 43; by Secretary of Labor Perkins, Senate Hearings, *supra,* pp. 80–81, 92–93, House Hearings, *supra,* pp. 2626–2632. The testimony of these officials leaves no doubt that during the war they were

[19] The national interest still requires that federal labor legislation regulating "commerce" be held applicable to employees in Government-owned, privately-operated plants producing munitions for war. See *United States* v. *Carbide & Carbon Chemicals Corp.* (E. D. Tenn., Civil No. 1093, decided March 19, 1948), where the Labor Management Relations Act of 1947 was recently invoked to enjoin a threatened strike at the Oak Ridge National Laboratory (owned by the United States and operated under contract between the U. S. Atomic Energy Commission and the Carbide & Carbon Chemicals Corp.), on the ground that it would affect an industry "engaged in * * * commerce" and "in the production of goods for commerce."

agreed that adherence to the statutory overtime standards had a stabilizing influence in that it reduced demands for increases in basic wages and prevented the agitation attendant upon such demands and also afforded incentive for the necessary longer hours. While it was recognized that payment of time and one-half for overtime might cost the Government several billion dollars (see House Hearings, *supra*, at p. 2553), it was agreed by the above officials that this expense was preferable to the incalculable expense and disruption that might result from demands for increases in basic wage rates if overtime compensation were suspended.

That Congress was aware of and recognized the applicability of the Act to employees of cost-plus contractors with the Government is conclusively evidenced by the enactment of the Portal-to-Portal Act of 1947 (Public Law 49, 80th Cong., Chapter 52—1st Sess.). In its findings in Section 1 (a) (9) of the Portal Act Congress stated that if certain liabilities under the Act were permitted to stand, "the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts." The Committee Reports of both Houses of Congress referred to the added cost to the Government by virtue of liabilities to cost-plus contractors if the

portal-to-portal suits by employees were successfully prosecuted. See S. Rept. 48, 80th Cong., 1st Sess., pp. 32–39, and H. Rept. 71, 80th Cong., 1st Sess., pp. 4–6. Thus Congress both during and after the war seems never to have doubted that the Act covers employees of cost-plus contractors with the Government who were engaged in the production of munitions of war.

We believe that in the Portal Act, Congress indicated the extent to which it felt liability should be limited for failure to comply with the statutory standards in the execution of these contracts.[20] When consideration is given to the high proportion of the country's productive capacity which was devoted to the production of materials of war under cost-plus contracts, and the drastic curtailment of the scope of the Act if such production were excluded, it does not seem reasonable to read into the Act by implication the far-reaching exemption suggested in the opinion of the court below, in the absence of clear and substantial evidence that Congress intended such exemption.

It thus appears that the decision of the court below that the munitions were not produced for "commerce" rests on a misconception that "com-

[20] The Portal-to-Portal Act is also a recognition by Congress that employees of contractors with the Government are not excluded from the Act as Government employees; see Point I, *supra*. The defenses provided in the Portal Act may, of course, still be asserted in the instant case in the event of reversal of the decision below.

merce" is confined to commercial transactions, is contrary to the controlling decisions of this Court as well as to the clear terms of the statutory definition, and is inconsistent with the apparent intent and understanding of Congress.

III

Section 3 (i) Does Not Exclude Respondent From the Scope of the Act

Section 3 (i) of the Fair Labor Standards Act defines "goods" as used in the Act as meaning all commodities, excepting "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." The court below held that even if it were wrong in holding the munitions not to be articles of commerce and the United States to be the producer, "the Act, under sub-paragraph (i) of Sec. 3, would still be inapplicable because the term 'goods' 'does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than a producer, manufacturer or processor thereof.' " (R. 252–253).

Plainly, Section 3 (i) was not intended to exempt from the Act employees working on the goods during the course of production, manufacture or processing. Here the employees of the contractor were not working on the goods *after* their delivery to the United States as ultimate consumer but while the goods were being manu-

factured or processed. Thus they plainly do not come within the language of the exempting clause, which relates only to "goods after their delivery into the actual physical possession of the ultimate consumer".[11]

The court below apparently was of the view that if the ultimate consumer took delivery within the state in which the goods were manufactured or produced, the subsequent interstate transportation by the consumer could not be taken into account in determining whether the goods were produced for commerce. Such a construction has the effect of extending the exemption to the producer and manufacturer. The result would be that if an ultimate consumer takes delivery within the state, the producer's operations are exempt, but if the consumer takes delivery after interstate transportation the producer's operations would be covered—although in each instance it was known that the goods were destined for interstate shipment.

[11] The record does not indicate that the Government, *before* the munitions were produced by petitioners, ever had physical possession, as distinguished from title, of any of the materials. But, assuming that some of the raw materials may have previously been in the hands of the United States, the "goods" which petitioners were producing, the munitions, were not delivered into the "actual physical possession" of the United States until *after* petitioners had produced them. In any event it seems clear that the delivery referred to in Section 3 (i) is delivery to the ultimate consumer for use in consumption and not for further processing, so that it is immaterial whether the raw materials had previously been in the "actual physical possession" of the Government.

Furthermore, since the exempting clause itself excludes the ultimate consumer who is also a "producer, manufacturer or processor," the result of the construction adopted by the court below would be to bring within the Act the manufacturing operations of an ultimate consumer who carries the goods across state lines, but to exempt the same operations if carried on by an independent manufacturer who sells to the ultimate consumer within the state.

It is only necessary to give Section 3 (i) a literal sensible reading to avoid these anomalous results. Such an interpretation of the exempting clause as not affecting the status of the goods while they are being produced (whether by the consumer or before delivery to him) is in accord not only with the terms of the statute, but with its purpose and history. Furthermore it has been the interpretation consistently adopted by the Government—Wage and Hour Administrator[22] and

[22] Administrator, Wage and Hour Division, Department of Labor, Interpretative Bulletin, No. 5 (Revision of November 1939), par. 6, 1940 Wage and Hour Manual 131, 133. This paragraph was readopted without change in the July 1947 revision of the Administrative Interpretations. See 29 C. F. R. Part 776.7(h), 12 Fed. Reg. 4583, 4585. The paragraph reads in part as follows:

"The fact that products lose their character as 'goods' when they come into the actual physical possession of the ultimate consumer does not affect the coverage of the Act as far as the employees producing the products are concerned. The facts at the time that the products are being produced determine whether an employee is engaged in the production of goods for commerce, and at the time of the production of the con-

Department of Justice [23]—and accepted by the Circuit Courts of Appeals, including the Fifth Circuit except in this case and another decision

tainers they were clearly 'goods' within the meaning of the statute since they were not, at that point of time, in the actual physical possession of the ultimate consumer. All that the term 'goods' quoted above is intended to accomplish is to protect ultimate consumers, other than producers, manufacturers, or processors of the goods in question from the 'hot goods' provision of section 15 (a) (1). This seems clear from the language of the statute. Thus section 15 (a) (1) makes it unlawful for any person 'to transport * * * (or) * * * ship * * * in commerce * * * any *goods*' produced in violation of the labor standards set up by the act. By defining 'goods' in section 3 (i) so as to exclude goods 'after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof,' the Congress made it clear that it did not intend to hold the ultimate consumer as a violator of section 15 (a) (1) if he should transport 'hot goods' across a State line. Thus, if a person purchases a pair of shoes from a retail store and carries the shoes across a State line, the purchaser is not, in our opinion, guilty of a violation of section 15 (a) (1) if the shoes were produced in violation of the wage or hour provisions of the statute. But Congress clearly did not intend to permit an employer to avoid the minimum wage and maximum hours standards of the act by making delivery within the State into the actual physical possession of the ultimate consumer who transports or ships the goods outside the State. Thus, it is our opinion that employees engaged in building a boat for delivery to the purchaser at the boatyard are within the coverage of the act if the employer, at the time the boat is being built, intends, hopes, or has reason to believe that the purchaser will sail it outside the State."

[23] See the following briefs filed by the Solicitor General in this Court: brief in opposition, *Hamlet Ice Co.* v. *Fleming*, 317 U. S. 634, 1942 Term, No. 104; brief in opposition, *Enterprise Box Co.* v. *Walling*, 316 U. S. 704, 1941 Term,

in which this Court granted certiorari on this question, *inter alia,* but subsequently vacated the Fifth Circuit's decision on another ground. *Hamlet Ice Co.* v. *Fleming,* 127 F. 2d 165, 170–171 (C. C. A. 4), certiorari denied, 317 U. S. 634; *Chapman* v. *Home Ice Co.,* 136 F. 2d 353, 355 (C. C. A. 6), certiorari denied, 320 U. S. 761; *Enterprise Box Co.* v. *Walling,* 125 F. 2d 897 (C. C. A. 5), certiorari denied, 316 U. S. 704; *Atlantic Co.* v. *Walling,* 131 F. 2d 518, 521 (C. C. A. 5). Contra: *Walling* v. *Reuter, Inc.,* 137 F. 2d 315 (C. C. A. 5), judgment vacated, 321 U. S. 671.[24] Many

No. 1275, p. 6; petition for certiorari (pp. 8–9), and brief on the merits, pp. 13–17, *Walling* v. *Reuter, Inc.,* 321 U. S. 671, 1943 Term, No. 436; brief on the merits, p. 17, in *Roland Electrical Co.* v. *Walling,* 326 U. S. 657, 1945 Term, No. 45. The brief in the *Hamlet Ice* case, filed in 1942, stated on this point (pp. 4–5):

"Section 3 (i) excludes from the term 'goods' products '*after* their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof.' [Italics supplied.] Since petitioner produces goods *before* their delivery to the ultimate consumer, it does not come within this provision. As the language of the clause indicates and as the court below held (R. 179–180), the purpose of the provision was not to make the Act inapplicable to producers, but to protect the ultimate consumer who carries goods across state lines as his personal property from the prohibitions of Section 15 (a) (1). Manifestly, even if the carriers be regarded as ultimate consumers, the fact that the ice might not be goods while in their possession does not relate back to destroy its character as 'goods' at the time of production."

[24] *Divins* v. *Hazeltine Electronics Corp.,* 163 F. 2d 100 (C. C. A. 2), is not to the contrary. The employees of the contractor there held not subject to the Act were installing,

other decisions which contain no specific reference to Section 3 (i) hold the Act applicable to employees engaged in production for commerce in identical or similar circumstances, although the "goods" being worked on were owned by the "ultimate consumer."[33]

servicing, and maintaining equipment on war vessels owned by the United States. After having held, we think erroneously, that the subsequent movements of the vessels could not be regarded as interstate or foreign commerce (as to which see Point II, *supra*, pp. 23–37), the court concluded (163 F. 2d at 103–104) that the employees were working on the goods after their delivery to the possession of the ultimate consumer, and not in the course of production for subsequent commerce. In that case, the court found that the work was performed after the equipment had "been delivered into [the] actual physical possession" of the United States "prior to the time when the plaintiffs did any work upon it", and that there was no commerce after this delivery to the United States. *Id.*, at 101–102. The opinion reaches the "opposite result" as to work on armed cargo transports which it found to be instruments of commerce and not of war. As to these the court found that the United States was a processor of the equipment for commerce (*id.*, at 104). The court was clearly therefore not misinterpreting Section 3 (i) as excepting the production of goods before their delivery to the ultimate consumer for interstate transportation; on its understanding of "commerce", it had no such case before it, and its opinion was not addressed to any such situation. See also *Phillips* v. *Star Overall Co.*, 149 F. 2d 416 (C. C. A. 2), certiorari denied, 327 U. S. 780.

[33] *Bell* v. *Porter*, 159 F. 2d 117 (C. C. A. 7), certiorari denied, 330 U. S. 813; *Landreth* v. *Ford, Bacon & Davis*, 147 F. 2d 446 (C. C. A. 8); *Anderson* v. *Federal Cartridge Corp.*, 62 F. Supp. 775 (D. Minn.), affirmed, 156 F. 2d 681 (C. C. A. 8); *Anderson* v. *Federal Cartridge Corp.*, 72 F. Supp. 639 (D. Minn.); *Umthun* v. *Day & Zimmerman*, 235 Iowa 293, 16 N. W. 2d 258; *Timberlake* v. *Day & Zimmerman*, 49 F.

The *Hamlet Ice, Home Ice,* and *Atlantic* cases each involved manufacturers of ice who sold it within the state to interstate railroads for consumption in refrigerating railroad cars. Judge Soper's opinion for the Fourth Circuit in the *Hamlet* case, which was followed in the other two cases, rejects the argument that delivery to the consumer exempts the producer; his opinion states (127 F. 2d at 170–171):

> The appellant claims in addition that its activities are outside the statutory scheme on the particular ground that all the goods it produces are delivered to the ultimate consumer and are therefore excluded by the definition of goods set out in § 3 (i) of the Act. * * *
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> * * * * *
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> The contention is that the word "goods" is subject to the exception wherever it occurs in the Act, and therefore the Ice Company produces nothing and sells nothing within the intendment of the Act. We do not think this argument is sound. It disregards the precise terms of the section

Supp. 28 (S. D. Iowa); *Jackson* v. *Northwest Airlines*, 75 F. Supp. 32 (D. Minn.); *Roland* v. *United Airlines*, 6 W. H. Cases 663 (N. D. Ill., 1947); *Swettman* v. *Remington Rand*, 6 W. H. Cases 836 (S. D. Ill., 1946); *Reid* v. *Day & Zimmerman*, 73 F. Supp. 892 (S. D. Iowa); *U. S. Cartridge Co.* v. *Powell*, no opinion (E. D. Mo., May 19, 1947); *Lasater* v. *Hercules Powder Co.*, 73 F. Supp. 264 (E. D. Tenn.); *Bailey* v. *Porter*, 6 W. H. Cases 1017 (N. D. Ill., 1947); *Ware* v. *Goodyear Engineering Corp.*, 6 W. H. Cases 160 (S. D. Ind., 1946); *Moehl* v. *du Pont de Nemours & Co.*, 6 W. H. Cases 638 (N. D. Ill., 1947).

> that the goods excluded are not those in the possession of the maker but "goods *after* their delivery into the actual physical possession of the ultimate consumer". Goods in the course of production are therefore not expressly excluded and exclusion, we think, should not be implied. * * * It seems clear that the exclusion clause was intended to apply only to goods which, having come into the hands of the ultimate consumer, have been withdrawn from further traffic and sale, so that interstate transportation of the goods may take place without responsibility for a prior production in violation of the standards of the Act. This narrow purpose is evidenced by limiting the exclusion to "the ultimate consumer * * * other than a producer, manufacturer, or processor thereof".

Under the terms of the exclusionary clause, the applicability of the exemption necessarily depends upon two conditions: (1) that the United States was not "a producer, manufacturer or processor" of the goods, and (2) that the goods were in "the actual physical possession" of the United States as an "ultimate consumer." If, as respondent contends, the United States is the real employer here and is at all times in control of the operations, then the United States is clearly "a producer, manufacturer, or processor" of the goods in question and condition (1) has not been met. Thus, Section 3 (i) can be relied upon only as an alternative defense in the event that the respond-

ent, and not the United States, is held to be the employer-producer. But in this event, condition (2) could not be met, for the goods while being worked on were obviously in "the actual physical possession" of the producer.

The use of the words "actual physical possession" negates the idea that mere title or ownership suffices. The terms of the contract between respondent and the United States make it clear that only title, and not physical possession, was retained by the United States during the performance of the contract. Thus the contract provides that property "title to which is or may hereafter become vested in the Government, will be used by or will be *in the care, custody or possession of the Contractor* in connection with the performance of this contract" (R. 114-115; [italics supplied]). It also provides that the contracting officer (representing the Government Department or agency concerned) "shall at all times have access to the premises, work, and materials, etc." (R. 74) and that in case of termination through the fault of the contractor, he "may enter upon the premises and take possession" (R. 68-69)—provisions inconsistent with the contention that the Government retained "actual physical possession" of the materials and goods during the performance of the contract. Thus, it seems clear that during the course of production the materials being worked on were in the "actual physical possession" of the respondent. Under the literal language of the

exclusionary provision materials worked on remain "goods" as long as they are in the actual physical possession of a producer even if the producer be the ultimate consumer. Therefore it would seem to follow from the literal statutory language that the materials here were "goods."

This conclusion is confirmed by other provisions and the general framework of the Act, by the legislative history, and by the judicial decisions construing Section 3 (i).

There seems ample evidence on the face of the statute itself that there was no intent to exclude the productive process or the producer from the statutory standards. First, there is the explicit provision in Section 3 (i) itself that the exclusion does not apply to a producer even if he be the ultimate consumer. There is also the comparable provision in Section 15 (a) (1), which protects a common carrier from liability for transportation of "hot" goods, and limits this protection to "goods *not produced by such common carrier.*" [Italics supplied.] Furthermore, while the constitutional authority for the statute rested primarily on the Congressional power directly to regulate or prohibit movement across State lines of tainted or "hot" goods, the basic policy of the Act, as expressed in the findings and declaration of policy (Section 2 (a)), was to eliminate the substandard labor conditions at their source—*in the factory or plant of the producer* for interstate shipment. See *United States* v. *Darby,* 312 U. S.

100, 117. While there are obvious reasons justifying protection of the innocent consumer from liability for substandard conditions maintained by a producer, no reasonable basis has been suggested for relieving a producer from liability for the substandard conditions in his own plant. To imply such release of the producer is inconsistent with the whole policy of the Act.

The legislative history affords further evidence that Congress advisedly phrased the exclusionary clause so as to protect the ultimate consumer without curtailing the liability or responsibility of the producer. In the bill as originally introduced in the Senate, the definition of "goods" provided that it "shall not mean goods in the possession of the ultimate consumer thereof" (S. 2475, introduced May 24, 1937, 75th Cong., 1st sess., Section 2 (a) (21)). The representatives of the National Association of Manufacturers and of the Chamber of Commerce criticized this bill as affording adequate protection only to the ultimate consumer and not to producers, distributors and other businessmen. See statement of James A. Emery, General Counsel, National Association of Manufacturers, and George H. Davis, President, Chamber of Commerce of the United States. Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st sess., on S. 2475 and H. R. 7200, pp. 639, 936–937. The President of the Chamber of Commerce objected specifically on the ground that

if a producer of grain maintained substandard conditions, the grain "in the hands of mill purchasers, and possibly in the hands of bakers that bought flour made from the wheat" would "contain that taint" and "only the ultimate consumer, who bought the bread to use at home, would be safe from Federal prosecution" (*id.* at 937). The General Counsel of the National Association of Manufacturers also indicated his understanding that the exclusionary clause in the definition of the term "goods" only "exempts the ultimate consumer from any criminal liability for any part he might play in the interstate transportation of such unfair goods" (*id.* at 639). Thus although the representatives of manufacturers and businessmen urged that the protection not be thus limited but be extended generally to "innocent purchasers without notice" (*id.* at 937), Congress not only failed to broaden the protection but on the contrary narrowed the scope of the exclusionary clause by prefacing the word "possession" with the phrase "after their delivery into the actual physical," and by making explicit its limitation to an ultimate consumer "*other than a* producer, manufacturer or processor thereof" [italics supplied]. At the same time Congress dropped the provisions of earlier bills which would have permitted the Board to extend the protection under certain specified circumstances.[29]

[29] Sec. 21 (d) of S. 2475 as originally introduced would have permitted the administrative board to relieve others

That the intent was to exempt only the ultimate consumer from the Act and not the producer would seem sufficiently evident from the proviso in the exclusionary clause making the exemption inapplicable even to an ultimate consumer of goods if he also was "a producer, manufacturer, or processor thereof." The contrary conclusion of the court below is predicated on the reasoning that if the munitions were not "goods" in the hands of the ultimate consumer (the Government) they could not take on the character of goods in the producer's hands by reason of the subsequent interstate movement by the ultimate consumer, that is, that the movement "by the ultimate consumer over state lines would not relate back and take the goods out of the exception" of Section 3 (i).

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from liability for transportation of goods upon a finding by the board that they "had no reason to believe that any substandard labor condition existed in the production of such goods" or that such relief was "necessary to prevent undue hardship or economic waste and is not detrimental to the public interest," provided that adequate provision was made for reparation of underpayments to employees. The bill as reported to the Senate July 8, 1937, after the hearings, included, in addition to the above-quoted sections, a provision authorizing the Board to issue certificates of compliance which might be relied upon by any purchaser or transporter of goods to demonstrate that he had "no reason to believe any substandard labor condition existed in the production of such goods." S. 2475 accompanying S. Rept. No. 884, Section 14 (c). Similar provisions were in the bill as reported to the House on August 6, 1937 (S. 2475), accompanying H. Rept. No. 1452, section 2 (a) (14), 18 (c), 14 (b). None of them appeared in the bill as passed by the House on May 24, 1938.

(R. 253.) The fallacy of this reasoning is that it disregards the obvious purpose of the provision to protect the ultimate consumer without depriving the producer's employees of the statutory standards. This purpose is clear from the fact that if the ultimate consumer is a producer he explicitly is not exempt under Section 3 (i). It would seem to follow, *a fortiori,* that a producer who is not an ultimate consumer would not be exempt. But, under the court's reasoning the Act would apply to the employees of an ultimate consumer who was working on his own goods but would not apply to the same employees working on the same goods if they were employed by an independent contractor engaged by the ultimate consumer to do the work. This would make the exemption depend wholly upon "the capricious incidence of the act resulting from the accident of the industrial division of the whole process." See *Fleming* v. *Arsenal Building Corp.,* 125 F. 2d 278, 280 (C. C. A. 2), affirmed, 316 U. S. 517.

The interpretation of the court below would have serious effects not only in cases involving Government contractors, but in the application of the Act generally. Under respondent's theory, any producer of goods plainly intended for shipment across State lines might secure the exemption simply because the consumer-purchaser took title or delivery of the goods before the interstate shipment. Thus, contrary to the consistent rul-

ing of the courts,[27] the producer of ice for use in icing railroad cars, although knowing that the ice was destined for interstate shipment, would be exempt because the railroad took delivery of the ice before it crossed State lines. Other anomalous effects of this construction may be illustrated by reference to cases that have arisen under the Act. In *Slover* v. *Wathen*, 140 F. 2d 258 (C. C. A. 4), one company maintained a dock at which it repaired barges owned by an affiliated company. Employees repairing the barges were considered engaged in the production of goods for commerce. Since the court considered the two companies as one, the ultimate consumer of the barges was also the producer thereof, and the consumer clause was therefore inapplicable. But under the theory of the court below, if the company which operated the barges was deemed independent of the company which repaired them, the same employees performing the same work would no longer be engaged in the production of "goods" because "the ultimate consumer" was not a producer thereof. Similarly, in *Hertz Drivurself Stations* v. *United States*, 150 F. 2d 923 (C. C. A. 8),

[27] See *Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165, 170–171 (C. C. A. 4), certiorari denied, 317 U. S. 634; *Chapman* v. *Home Ice Co.*, 136 F. 2d 353, 355 (C. C. A. 6), certiorari denied, 320 U. S. 761; *Atlantic Co.* v. *Walling*, 131 F. 2d 518, 521 (C. C. A. 5); *Gordon* v. *Paducah Ice Mfg. Co.*, 41 F. Supp. 980, 986 (W. D. Ky.).

employees repairing trucks owned by their employer were held to be engaged in the production of goods for commerce because the trucks were used in interstate transportation. If the construction of the court below were adopted, employees working on such trucks would be working on "goods" if they were employed by the truck owner but not if they were employed by an independent contractor.

Section 3 (i) obviously was not calculated to achieve such capricious results. Such an interpretation, contrary to the established principle of strict construction of exemptions from this remedial Act (see *Phillips Co.* v. *Walling*, 324 U. S. 490, 493), would distort the simple restricted purpose of the exclusionary clause into far-reaching and irrational exemptions.

CONCLUSION

For the above reasons it is respectfully submitted that the opinion of the court below is incorrect on each of the points decided.

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